

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VIVENDI S.A.,

Plaintiff,

v.

T-MOBILE USA, INC.; T-MOBILE  
DEUTSCHLAND GMBH; T-MOBILE  
INTERNATIONAL AG; DEUTSCHE  
TELEKOM AG; and ZYGMUNT SOLORZ-  
ZAK,

Defendants.

No. CV6-1524 JLR

**DT DEFENDANTS' MOTION  
TO DISMISS THE SECOND  
AMENDED COMPLAINT**

**Note on Motion Calendar:  
June 8, 2007**

***Oral Argument Requested***

MOTION TO DISMISS (CV6-1524 JLR)

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Defendants Deutsche Telekom AG (“DT”), T-Mobile International AG (“T-Mobile International”), T-Mobile Deutschland GmbH (“TMD”), and T-Mobile USA, Inc. (“T-Mobile USA”) (collectively, the “DT Defendants”) respectfully submit this motion to dismiss the Second Amended Complaint (“SAC” or “Complaint”) of Plaintiff Vivendi S.A. (“Vivendi”).

## I. INTRODUCTION

This Court now joins dozens of tribunals in six European countries that have been asked to consider (or are currently considering) this dispute among German, French, and Polish competitors in the European telecommunications market over control of a Polish telecommunications company, Polska Telefonia Cyfrowa Sp. z o.o. (“PTC”). Arbitral tribunals sited in Austria have concluded that the attempted transfer of PTC shares by Elektrim to a corporate vehicle owned in part and controlled by Vivendi constituted a material default under PTC’s joint-venture agreements and that the attempted transfer was ineffective as a matter of governing Polish law. Vivendi has attacked these adverse rulings, resisted their enforcement, and filed multiple new proceedings against DT, TMD, and others in Poland, Austria, France, the United Kingdom, Switzerland, and Germany. None of these proceedings has resulted in a finding that the DT Defendants committed any wrongdoing.

Now, Vivendi has come over 5,000 miles to the Western District of Washington and attempted to manufacture a basis to litigate here. In this action, Vivendi alleges that the DT Defendants violated the Racketeer Influenced and Corrupt Organizations provisions of the Organized Crime Control Act of 1970 (“RICO”) through purportedly misleading statements made during alleged settlement negotiations conducted in Europe and in press releases about the rulings of foreign arbitral tribunals and courts. Tellingly, this suit marks the *first time* in eight years that Vivendi has suggested that T-Mobile USA had any involvement in the dispute over PTC, or that there was any connection *at all* between that dispute and the United States.

For the following reasons, the Court should dismiss the Complaint with prejudice.

*First*, the Western District of Washington is an inappropriate forum under the doctrine

1 of *forum non conveniens*. In its Order of April 18, 2007, the Court indicated that it intends to  
2 address this issue before reaching any alternative ground for dismissal.

3 **Second**, the Court lacks personal jurisdiction over Defendants DT, T-Mobile  
4 International, and TMD (the “German DT Defendants”). Vivendi has not alleged (and cannot  
5 allege) that the German DT Defendants engaged in conduct in Washington sufficient to create  
6 general or specific jurisdiction over them.

7 **Third**, the Court lacks subject matter jurisdiction. The conduct at issue did not occur  
8 in the United States and did not have any material effect on the United States. Thus, United  
9 States courts do not have subject matter jurisdiction over the dispute.

10 **Fourth**, the Complaint fails to state a RICO claim. The RICO claims revolve around  
11 settlement discussions that did not lead to a final settlement and indisputably accurate press  
12 releases. The allegations concerning these actions do not meet several of the fundamental  
13 elements of a RICO claim, including the requirement of a pattern of racketeering activity.

## 14 II. FACTUAL BACKGROUND

15 The facts relevant to this motion to dismiss may be taken largely from the allegations  
16 in Vivendi’s Complaint.

### 17 A. The Genesis of the Dispute over PTC.

18 In 1995, TMD, a German company; Elektrim S.A. (“Elektrim”), a Polish company;  
19 and other investors founded PTC. (SAC ¶¶ 28, 30.) Initially, Elektrim owned 37.1% of PTC  
20 and TMD owned 22.5%. (*Id.* ¶ 30.) The remainder of the stock was held by US West  
21 International B.V. (22.5%), a Dutch company; Polpager, a Polish company (4%); and a group  
22 of Polish investors (13.9%). (*Id.*) PTC’s original joint venture partners entered into a  
23 Shareholders Agreement and Deed of Formation that (a) prohibited any transfer of PTC  
24 shares without the unanimous consent of certain PTC shareholders, including TMD; and  
25 (b) gave each shareholder a Call Option that could be exercised over another shareholder’s  
26  
27

1 PTC shares in the event that the second shareholder committed a serious breach of the  
2 agreements. (*See id.* ¶ 29.)

3 In 1999, Elektrim acquired the shares of other investors, bringing its total to 48%; and  
4 Elektrim and Vivendi established a joint-venture vehicle called Telco, which, according to  
5 their plan, would ultimately hold Elektrim's 48% shareholding in PTC. (*Id.* ¶¶ 33, 36.)  
6 Vivendi and Telco paid Elektrim to transfer its 48% direct PTC shareholding to Telco. (*See*  
7 *id.* ¶ 36.) As the Complaint implies, Vivendi and Telco entered into this transaction *without*  
8 obtaining approval from PTC's corporate bodies, which they knew was required. (*See id.*)

9 **B. The Second Vienna Arbitration.**

10 Because it believed that Elektrim's attempted transfer of PTC shares was invalid,  
11 TMD pursued claims against Telco and Elektrim in arbitration in Vienna, Austria ("Second  
12 Vienna Arbitration"),<sup>1</sup> pursuant to arbitration clauses in the PTC Shareholders Agreement and  
13 Deed of Formation. (*See id.* ¶ 44.) TMD sought declarations that the purported share transfer  
14 to Telco was ineffective, that Elektrim accordingly continued to own the 48% PTC  
15 shareholding, and that Elektrim had committed a material default, entitling TMD to exercise  
16 its Call Option over Elektrim's PTC shares. In accordance with the terms of the Shareholders  
17 Agreement, the dispute was decided under Polish law. (*See* PTC Shareholders Agreement,  
18 Art. 20, attached as Ex. A to Declaration of Stephen M. Rummage ("Rummage Decl.").)

19 In November 2004, the Second Vienna Arbitration tribunal unanimously issued an  
20 award declaring that: the purported transfer of Elektrim's PTC shares to Telco pursuant to  
21 Elektrim's agreements with Vivendi was deliberately wrongful and ineffective as a matter of  
22 Polish law; Elektrim materially breached its joint venture obligations to TMD; and that, if  
23 Elektrim failed to restore the status quo within two months, Elektrim would be in material  
24 default under the Shareholders Agreement. (*See* SAC ¶ 57.)

25  
26 <sup>1</sup> The "First Vienna Arbitration" (SAC ¶¶ 38-43) has little relevance to the Complaint, and Vivendi does not  
27 allege that any acts of racketeering occurred in relation to that proceeding.

### C. The Third Vienna Arbitration.

When Elektrim failed to restore the status quo ante within two months, TMD exercised the Call Option on February 15, 2005, and initiated a third arbitration in Vienna against Elektrim (“Third Vienna Arbitration”), seeking a declaration that it was entitled to exercise its Call Option. (*Id.* ¶ 77.) In the First Partial Award, issued on June 6, 2006, the tribunal ruled that TMD had the right to exercise its Call Option. (*Id.* ¶ 87.) In the Second Partial Award, issued on October 2, 2006, the tribunal again upheld TMD’s right to exercise its Call Option, held that legal title to the shares would transfer to TMD effective February 15, 2005, and held that factual control would transfer immediately upon payment of approximately €600 million to Elektrim along with an undertaking to pay a potential further adjusted amount to be determined by the tribunal. (*See id.* ¶ 110, 115.) In compliance with the Second Partial Award, TMD paid over €600 million to Elektrim for the PTC shares and provided the undertaking. (*See id.* ¶ 115.)

### D. Proceedings Initiated by Vivendi throughout Europe.

During and after the Second and Third Vienna Arbitrations, Vivendi initiated litigation across Europe in an attempt to challenge or undo the consequences of the Vienna awards. Although the Complaint mentions only a few of these proceedings, it nevertheless reveals that courts and arbitral tribunals abroad have been heavily involved in addressing this dispute. (*See SAC* ¶¶ 38, 44, 59, 63, 77, 79, 85, 87, 90, 95, 110, 118, 119.) In addition, Vivendi’s public filings and the DT Defendants’ declarations in support of this motion to dismiss further detail Vivendi’s efforts, in diverse European tribunals, to obtain relief comparable to that sought in this Court.<sup>2</sup>

#### 1. Poland.

More than a dozen actions have been filed in Polish courts relating to the PTC dispute. (Declaration of Uli Kuehbacher (“Kuehbacher Decl.”) ¶¶ 20-23.) Many are ongoing. (*Id.*

<sup>2</sup> “The court may accept declarations outside the pleadings to decide *forum non conveniens* or personal jurisdiction.” *U.S. Vestor, LLC v. Biodata Info. Tech. AG*, 290 F. Supp. 2d 1057, 1062 n.1 (N.D. Cal. 2003).

¶¶ 22-23) Elektrim and TMD filed proceedings in the Warsaw Regional Court seeking recognition of the Second Vienna Award. (SAC ¶ 59.) The court of first instance recognized the Award. (*Id.* ¶ 63.) Although that decision was upheld on appeal, on January 18, 2007, the Supreme Court of Poland reversed the appellate court's decision, on procedural grounds, and remanded the case to the Warsaw Regional Court for further proceedings. (*Id.* ¶ 119.) According to Vivendi, "[a]s a result [of the Polish Supreme Court's decision,] the Vienna Award has no effect in Poland and according to Polish law *Telco is the owner of 48% of PTC.*" (Vivendi Press Release, dated January 18, 2007, attached as Ex. B to Rummage Decl.) Thus, Vivendi brings an action here to recover shares that it claims to own already.

Meanwhile, Vivendi (through Telco) has filed additional proceedings in Poland: to declare invalid TMD's acquisition of the PTC shares; to list Telco as the owner of the disputed PTC shares in the National Court Register, the official Polish registry of shareholders; to prohibit PTC from distributing profits; to prohibit Elektrim's representatives on the PTC Management and Supervisory Boards from acting on behalf of PTC; to prohibit TMD and Elektrim from exercising shareholder rights with regard to the disputed PTC shares; to restrain Elektrim from transferring or taking any action with regard to the disputed shares; to order Elektrim to return the PTC shares or their value to Telco; for damages against PTC Supervisory Board and Management Board members and PTC shareholders; and to prohibit Elektrim from transferring funds to its creditors. (SAC ¶¶ 66-68, 79, 93-94; Kuehbacher Decl. ¶¶ 20-23; Vivendi Management Board's Operating and Financial Review and Prospects, at 65 ("Vivendi Report"), attached as Ex. C to Rummage Decl.) In addition, Vivendi has initiated arbitral proceedings against the Republic of Poland, pursuant to the bilateral investment treaty between France and Poland. (SAC ¶ 70; Vivendi Report at 66.)

## 2. Austria.

Vivendi, through Telco, filed suit in Austria to vacate the Second Vienna Award. (Kuehbacher Decl. ¶¶ 24-25.) On December 18, 2006, the Austrian Supreme Court upheld



the lower courts' rejection of Telco's challenge to the award. (SAC ¶ 118; Kuehbacher Decl. ¶ 25; Vivendi Report at 66.) Telco was ordered to pay TMD's and other defendants' attorneys' fees and costs. (Kuehbacher Decl. ¶ 25.)

### 3. France.

In April 2005, Vivendi filed suit in the Commercial Court of Paris alleging that DT and T-Mobile International AG & Co. KG violated French law by breaking off settlement talks in 2003 and 2004 in bad faith and colluding with Elektrim ("French Action"). As explained below, *see infra* Part III.A.2.b, Vivendi seeks damages in the French Action in the amount of its investment in Telco. (*See* Commercial Court of Paris Summons, *Vivendi Universal v. T-Mobile International AG & Co. KG* ("Paris Summons"), attached as Ex. H to Kuehbacher Decl.; Vivendi Report at 66.) The French Action is currently pending.

### 4. United Kingdom.

Vivendi initiated arbitration against Elektrim before the London Court of International Arbitration pursuant to the investment agreements between the two companies. (*See* SAC ¶¶ 90-96; Vivendi Report at 66.) There, Vivendi again seeks damages in the amount of its investment in PTC or the value of the PTC shares. *See Elektrim S.A. v. Vivendi Universal S.A.*, 2007 WL 763664, [2007] EWHC 571 at ¶ 19 (Q.B.) (noting that Vivendi initiated arbitration against Elektrim for damages for, among other things, the loss of Vivendi's "original Euros 1.7 billion investment" in PTC (emphasis and internal quotation marks omitted)).

### 5. Switzerland.

In April 2006, Vivendi commenced arbitration proceedings in Geneva, Switzerland in which Vivendi claims to be the owner of the disputed PTC shares based on a purported oral agreement with TMD, DT, T-Mobile International AG & Co. KG, and other companies. Vivendi again seeks to regain the disputed PTC shares or to be awarded the value of its lost investment. (*See* Vivendi Report at 66-67; Kuehbacher Decl. ¶ 29.)

## 6. Germany.

Vivendi sued DT in Hamburg, requesting that the court prohibit DT from making any statements to the effect that it owns the disputed PTC shares. In a decision dated November 7, 2006, the Hamburg District Court dismissed Vivendi's claim. (*See* Kuehbacher Decl. ¶ 28.)

### E. This RICO Case.

Vivendi has now initiated, of all things, a RICO claim in this Court. The Complaint alleges that through purported acts of wire fraud the DT Defendants illegally seized PTC and operated two enterprises—the so-called “T-Mobile global network,” which Vivendi never defines, and Elektrim. (*See* SAC ¶ 123.) The Complaint alleges two counts, the first for violation of, and conspiracy to violate, 18 U.S.C. § 1962(b), based on the alleged acquisition of control over PTC through a pattern of racketeering; the second for violation of, and conspiracy to violate, 18 U.S.C. § 1962(c), based on the alleged conduct of the affairs of Elektrim and the “T-Mobile global wireless network” through a pattern of racketeering. (*See id.* ¶¶ 129-47.) The relief sought is comparable to the relief Vivendi is seeking in pending European proceedings, that is, “the money or the [PTC] shares.” (*Id.* ¶ 16.)

## III. ARGUMENT

### A. The Court Should Dismiss the Complaint under the Doctrine of *Forum Non Conveniens*.

#### 1. The Court Has Indicated That It Will Consider *Forum Non Conveniens* First.

In its April 18, 2007 Order, the Court indicated that, “[b]ecause it may be dispositive in this case,” the Court intends to address the issue of *forum non conveniens* before reaching any alternative ground for dismissal. Order of Apr. 18, 2007, at 4. Given the lack of any genuine connection between this controversy and the United States; the presence of adequate alternative fora; the inconvenience of a trial here, more than 5,000 miles away from virtually all of the relevant documents and witnesses; and the fact that similar proceedings seeking comparable relief are currently pending in Europe, this is a “textbook case for immediate

1 *forum non conveniens* dismissal.” See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*,  
 2 \_\_ U.S. \_\_, 127 S. Ct. 1184, 1189, 1194 (2007).

3 **2. The Relevant Considerations Support Dismissal under the**  
 4 **Doctrine of *Forum Non Conveniens*.**

5 **a. Vivendi’s Choice of Forum Is Entitled to Little Deference.**

6 Vivendi’s choice of a U.S. forum deserves little, if any, deference. Although a  
 7 defendant invoking the doctrine of *forum non conveniens* “ordinarily bears a heavy burden in  
 8 opposing the plaintiff’s chosen forum,” the “presumption in the plaintiff’s favor ‘applies with  
 9 less force’” where the forum is not the plaintiff’s home forum. *Id.* at 1191. Where a foreign  
 10 plaintiff selects a U.S. forum, “the private and public interest factors need not so heavily favor  
 11 the alternate forum,” *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606 (10th Cir. 1998),  
 12 and “dismissal will ordinarily be appropriate where . . . the plaintiff is unable to offer any  
 13 specific reasons of convenience supporting his choice,” *Piper Aircraft Co. v. Reyno*, 454 U.S.  
 14 235, 255-56 (1981). Furthermore, “the more it appears that the plaintiff’s choice of a U.S.  
 15 forum was motivated by forum-shopping reasons . . . the less deference the plaintiff’s choice  
 16 commands and, consequently, the easier it becomes for the defendant to succeed on a *forum*  
 17 *non conveniens* motion by showing that convenience would be better served by litigating in  
 18 another country’s courts.” *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71-72 (2d Cir.  
 19 2001).

20 Here, Vivendi has brought suit half-way around the world from its “home forum” in a  
 21 naked effort to forum shop: (1) the purported connection between this RICO suit and the  
 22 dispute is, at best, attenuated; (2) Vivendi seeks a treble-damages windfall under RICO,  
 23 which is unavailable abroad, (*see* SAC, Prayer for Relief); *Norex Petroleum Ltd. v. Access*  
 24 *Indus., Inc.*, 416 F.3d 146, 155 (2d Cir. 2005) (noting the forum-shopping engendered by  
 25 RICO treble damages); (3) Vivendi seeks to use proceedings in this Court to pursue discovery  
 26 under broader U.S. discovery rules: “In a U.S. court, if this case is allowed to proceed, we will  
 27 . . . ask a court to issue a subpoena or to allow us to seek documents under the court’s

1 supervisions as provided for by United States rules of civil proceedings” (Final Transcript,  
 2 Vivendi to announce new development in continuing dispute with T-Mobile and Elektrim  
 3 over Polish telecommunications at 9 (Oct. 24, 2006), attached as Ex. D to Rummage Decl.);  
 4 and (4) Vivendi is seeking comparable remedies, at the same time, before this and other  
 5 tribunals.

6 **b. Multiple Alternative Fora Can Adjudicate This Dispute.**

7 Any one of the many alternative fora in which Vivendi already has sought relief are  
 8 adequate to adjudicate this dispute. In particular, Poland, Germany, France and Austria would  
 9 all be adequate alternative fora. An alternative forum is “adequate” if: (1) the defendant is  
 10 amenable to service of process there, and (2) the forum provides “some remedy” for the  
 11 wrong at issue. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001). “This test is  
 12 easy to pass; typically, a forum will be inadequate only where the remedy provided is ‘so  
 13 clearly inadequate or unsatisfactory, that it is no remedy at all.’” *Tuazon v. R.J. Reynolds*  
 14 *Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) (quoting *Piper Aircraft*, 454 U.S. at 254)).<sup>3</sup>

15 As for the first prong of the test, the relevant DT Defendants are already parties in the  
 16 European proceedings. As to the second, not only are these alternative fora capable of  
 17 providing “some remedy” (*see* Declaration of Professor Paul Oberhammer (“Oberhammer  
 18 Decl.”) ¶¶ 8-22), the remedy Vivendi seeks here substantially tracks the remedy it has sought  
 19 (and is seeking) in proceedings in Europe—that is, either the “return” to Vivendi of the  
 20 disputed PTC shares or their “fair market value.”

21 In France, for example, Vivendi has filed a lawsuit against T-Mobile International  
 22 AG & Co. KG and DT that is pending before the Commercial Court of Paris. In the French  
 23 Action, Vivendi seeks substantially the same remedy as it seeks here based on substantially  
 24 the same allegations. As in this case, the French Action rests largely on Vivendi’s allegation

25 <sup>3</sup> It does not matter whether an alternative forum offers the treble-damages windfall that may be obtained through  
 26 RICO: “[T]he inability to assert a RICO claim in a foreign forum does not preclude a *forum non conveniens*  
 27 dismissal.” *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 769 (9th Cir. 1991).

1 that the DT Defendants colluded with Elektrim in an effort to induce Vivendi into fraudulent  
 2 settlement discussions. (*See* Paris Summons ¶ 17 (alleging that DT “lulled” Vivendi into  
 3 settlement talks with the purpose of seizing, in “collusion” with Elektrim, the PTC shares).)  
 4 Vivendi also seeks the lost value of the PTC shares both here and in France. (*Compare* Paris  
 5 Summons ¶¶ 24(2)-25, Prayer for Relief, *with* SAC ¶¶ 16, 18.) Vivendi continues to seek that  
 6 remedy in Poland (*see* Kuehbacher Decl. ¶¶ 20-23) and could seek that remedy in Austria and  
 7 Germany (*see* Oberhammer Decl. ¶¶ 8-22).

8 The SAC casually impugns the judicial systems of Austria, France, Germany, and  
 9 Poland. (*See, e.g.,* SAC ¶¶ 15, 127.) But “[a] litigant asserting inadequacy . . . must make a  
 10 powerful showing.” *Tuazon*, 433 F.3d at 1179. Accepting Vivendi’s allegation would require  
 11 this Court to condemn the judicial systems of at least four developed European nations,  
 12 something considerations of comity prohibit absent a much stronger showing than Vivendi  
 13 has made here. *See PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir.  
 14 1998) (“[C]onsiderations of comity preclude a court from adversely judging the quality of a  
 15 foreign justice system absent a showing of inadequate procedural safeguards, so such a  
 16 finding is rare.” (internal citation omitted)); *Blanco v. Blanco Indus. de Venez., S.A.*, 997 F.2d  
 17 974, 982 (2d Cir. 1993) (“[I]t is not the business of our courts to assume the responsibility for  
 18 supervising the integrity of the judicial system of another sovereign nation.” (internal citation  
 19 omitted)). Indeed, it would surely be news to the Commercial Court of Paris that Vivendi  
 20 believes its home country to be an inadequate forum to adjudicate the very claims that  
 21 Vivendi has brought against DT and is prosecuting in that court.

22 **c. The Private Interest Factors Strongly Favor the Alternative**  
 23 **Fora.**

24 The private interest factors weigh strongly in favor of litigating this dispute in the  
 25 alternative fora. Those factors include: (1) the residence of the parties and the witnesses,  
 26 (2) access to sources of proof, (3) the cost of obtaining willing witnesses, (4) the availability  
 27

1 of compulsory process for unwilling witnesses, and (5) the policy favoring an expeditious  
2 trial. *See Lueck*, 236 F.3d at 1145.

3 First, all parties other than T-Mobile USA reside outside of the United States. Vivendi  
4 is French; DT, T-Mobile International, and TMD are German; and Solorz-Zak is Polish. (*See*  
5 SAC ¶ 20-22, 24, 27.) Second, all of the potentially relevant witnesses and documents are  
6 located outside the United States. (*See* Kuehbacher Decl. ¶¶ 30-38; Kirkpatrick Decl. ¶¶ 15-  
7 17.) Indeed, in its Rule 26(a) disclosures, Vivendi identified twenty-two persons or groups of  
8 persons with discoverable information—of which nine reside in France, seven in Poland, and  
9 one in the United Kingdom. (Pl.’s Initial Disclosures at 1-7, attached as Ex. E to Rummage  
10 Decl.) Of the DT Defendant employees Vivendi has identified, only one—Robert Dotson—  
11 resides in the United States. (*See id.* at 7; Kuehbacher Decl. ¶¶ 37-38.)<sup>4</sup> But Vivendi claims  
12 Mr. Dotson will have information only about “the relationship between T-Mobile  
13 International AG to T-Mobile USA” (Pl.’s Initial Disclosures at 7), an issue that has no  
14 bearing on the merits, but speaks to whether the case can be brought here at all. Vivendi also  
15 claims that a Vivendi representative in New York, George E. Bushnell III, has knowledge  
16 about a letter that Vivendi sent to DT on January 23, 2007. But Vivendi sent that letter *well*  
17 *after* this suit had been filed (*see id.* at 6; SAC ¶ 120), making it utterly irrelevant to  
18 Vivendi’s allegations.<sup>5</sup> Likewise, the documents on which Vivendi intends to rely are  
19 overwhelmingly located in Europe. (Pl.’s Initial Disclosures at 11.) The cost of translating  
20 and bringing documents and witnesses to Seattle would far outweigh the cost of litigating this  
21 dispute in one of the alternative European fora the DT Defendants have identified.<sup>6</sup>

22 <sup>4</sup> Peter Golob, who allegedly communicated five of the purportedly fraudulent statements (SAC ¶ 51), is not and  
23 was never an employee of any of the DT Defendants (Kuehbacher Decl. ¶ 37). Golob resides in London. (*Id.*)

24 <sup>5</sup> Vivendi also speculates that certain unnamed and unquantified “U.S. bondholders of Elektrim” may be  
25 potential witnesses. (Pl. Initial Disclosures at 6.) According to Vivendi, these unidentified bondholders may  
26 have knowledge of the alleged effort to deceive them into withdrawing a bankruptcy petition *in Poland*. (*See*  
27 *id.*) Any such bondholders have already been parties to aspects of this dispute in Poland (*see* SAC ¶ 76), and  
their purported knowledge would be irrelevant to Vivendi’s claimed injuries.

<sup>6</sup> While Vivendi claims that discovery will be facilitated by Poland’s and Germany’s status as parties to the  
Hague Convention on the Taking of Evidence Abroad (SAC ¶¶ 139, 147), Poland, Germany, France, and Austria  
are all members of the European Union and are accordingly bound by European Commission Regulation

**d. The Public Interest Factors Also Favor Alternative Fora.**

The public interest factors weigh equally strongly in favor of dismissal. Those public factors include: (1) local interest in the lawsuit, (2) the court's familiarity with governing law, (3) the burden on local courts and juries (including considerations of court congestion and the cost of resolving a dispute unrelated to this forum), (4) the interest of alternative fora in deciding local disputes, and (5) the interest in issues of foreign law being decided by foreign tribunals. *See Lueck*, 236 F.3d at 1147.

It is difficult to imagine any interest this District may have in deciding the dispute, but whatever it may be, it pales in comparison to that of Poland (the home jurisdiction of PTC and Elektrim, the allegedly corrupted enterprises), Austria (the situs of the arbitration proceedings at the heart of the dispute), Germany (the home jurisdiction of the German DT Defendants), and France (the home jurisdiction of the alleged victim).

Poland has a strong interest in resolving issues of Polish law, determining what company ultimately controls one of Poland's largest wireless telecommunications providers, and deciding whether its courts should recognize the Second and Third Vienna Awards. The Polish government also has a heightened interest in the subject matter of this suit because, as discussed, Vivendi has commenced arbitral proceedings against it under a bilateral investment treaty on reciprocal encouragement and protection of investments. (*See* SAC ¶ 70.) Further, Vivendi's allegations that the DT Defendants have violated Polish court orders and misrepresented the Polish Supreme Court's decision should be addressed in Poland, not the United States. *Cf. Armco, Inc. v. United Steelworkers of Am.*, 280 F.3d 669, 682 (6th Cir.

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1206/2001, which provides for a much more efficient regime of evidence-taking in European proceedings than the Hague Convention. *See* Commission Regulation 1206/2001, 2001 O.J. (L174) 1 (attached as Ex. M to Oberhammer Decl.); (Oberhammer Decl. ¶¶ 23-26). While the E.U. regime for evidence-taking in European proceedings aims for "[s]peed in transmission of requests for the performance of taking of evidence," Commission Regulation 1206/2001 ¶ 9, U.S. courts have described the Hague Convention as "time-consuming and cumbersome," *see, e.g., In re Auto. Refinishing Paint*, 229 F.R.D. 482, 493 (E.D. Pa. 2005) (internal citations omitted).



2002) (holding that a federal court should abstain in favor of a state proceeding because a “state has important interests . . . in enforcing the orders and judgments of its courts”).

Austria too has a strong interest because the object of the alleged conspiracy was the supposed corruption of two arbitral proceedings that took place in its territory under the auspices of an Austrian arbitral institution. *See Sinochem*, 127 S. Ct. at 1194 (holding that a claim based on misrepresentations to a Chinese court is best left for courts in China); *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997) (noting, with regard to reviewing an arbitral award, the “paramount importance” of courts where award was rendered).

Similarly, France has an interest in ensuring effective relief for its own citizen, Vivendi, particularly where French courts are actively considering one of the central claims that Vivendi asserts here. *See* Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (noting a state’s interest in regulating “the activities, interests, status, or relations of its nationals outside as well as within its territory”). Germany likewise has a strong interest in regulating the conduct of its nationals. *See id.*

By comparison, neither the State of Washington nor the United States has *any* genuine interest in whether TMD or Vivendi controls a leading Polish telecommunications company. Although Vivendi has named T-Mobile USA as a defendant, it has done so for the obvious purpose of attempting to fashion a link to the United States. Indeed, until it decided to file this lawsuit, Vivendi had never once, in the eight years that this dispute has been litigated and arbitrated in Europe, implicated T-Mobile USA in any way. (*See* Kirkpatrick Decl. ¶¶ 12-14; Kuehbacher Decl. ¶¶ 31-33.) Similarly, Vivendi has not made a single particularized allegation against T-Mobile USA in connection with any alleged racketeering conduct.<sup>7</sup> In

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<sup>7</sup> Although Vivendi speculates that the acquisition of PTC and inclusion of PTC on the DT Defendants’ financial reports facilitated T-Mobile USA’s acquisition of wireless spectrum during a Federal Communications Commission (“FCC”) auction (SAC ¶¶ 3, 23), Vivendi does not explain how T-Mobile USA supposedly used PTC to assist it in purchasing the U.S. spectrum and no financial reports were submitted in connection with the bid (Kirkpatrick Decl. ¶ 18).



1 these circumstances, the citizens of Washington and this Court should not be forced to “bear  
 2 the burden of this dispute.” *See Lueck*, 236 F.3d at 1147 (dismissing suit brought by foreign  
 3 plaintiffs alleging that Arizona manufacturer had built defective part that led to airline crash  
 4 in New Zealand because the interest of Arizona citizens paled in comparison to those of New  
 5 Zealand, where various related legal proceedings were pending); *see also Piper Aircraft*, 454  
 6 U.S. at 256 (“The American interest in [this suit] is simply not sufficient to justify the  
 7 enormous commitment of judicial time and resources that would inevitably be required if the  
 8 case were to be tried here.”).

9 In addition, this case will require application of foreign law. Under RICO, Vivendi  
 10 must prove it has suffered harm to a specific business or property interest. *See Diaz v. Gates*,  
 11 420 F.3d 897, 900 (9th Cir. 2005) (en banc & per curiam) (RICO plaintiff must establish harm  
 12 to a property interest, normally determined according to state law). To do so, Vivendi would  
 13 need to show that, in the absence of the purported fraud, the results of the arbitral proceedings  
 14 would have been different. Vivendi’s ability to meet this burden would depend on an analysis  
 15 of Polish law, which governs the rights and responsibilities of the parties to the PTC  
 16 Shareholders Agreement and regulates PTC itself. (*See* PTC Shareholders Agreement, Art.  
 17 20); *Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir. 1998) (“the rights of shareholders  
 18 in a foreign company . . . are determined by the law of the place where the company is  
 19 incorporated”). Indeed, if this case were to go forward, the Court would need to put itself in  
 20 the place of the arbitral tribunals in the Second and Third Vienna Arbitrations and decide,  
 21 under Polish law, whether Elektrim’s transfer to Telco of the shares was valid and whether  
 22 Vivendi had any right to the shares that was frustrated by the alleged racketeering. Courts in  
 23 Poland are better suited to apply Polish law to such questions.<sup>8</sup>

24 <sup>8</sup> Under the related doctrine of international abstention, the Court also may and should exercise its discretion to  
 25 abstain from jurisdiction because the pending proceedings already raise the issue whether Vivendi was  
 26 wrongfully deprived of the PTC shares and is entitled to their return. *See Mujica v. Occidental Petroleum Corp.*,  
 27 381 F. Supp. 2d 1134, 1157 (C.D. Cal. 2005) (“The international abstention doctrine ‘allows a court to abstain  
 from hearing an action if there is a first-filed foreign proceeding elsewhere.’” (quoting *Supermicro Computer, Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147, 1149 (N.D. Cal. 2001))). Because there are currently pending

**B. The Court Lacks Personal Jurisdiction over the German DT Defendants.**

The German DT Defendants are all organized under the laws of Germany with their principal places of business in that country. (Kuehbacher Decl. ¶ 3.) The claims against the German DT Defendants should be dismissed because none has sufficient contacts with Washington State to support the exercise of this Court's personal jurisdiction.

**1. Vivendi Cannot Rely on Group Pleading to Establish Personal Jurisdiction over the German DT Defendants.**

Vivendi bears the burden of pleading sufficient jurisdictional facts as to each defendant to avoid dismissal. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). "Personal jurisdiction over each defendant must be analyzed individually." *Brainerd v. Governors of Univ. of Alberta*, 873 F.2d 1257, 1258 (9th Cir. 1989). Because Vivendi's defective group pleading, under which it lumps all the DT Defendants together as "T-Mobile," makes it impossible for the Court to undertake this analysis, the Court should dismiss the Complaint as against the German DT Defendants. *See In re Royal Ahold N.V. Secs. & ERISA Litig.*, 351 F. Supp. 2d 334, 354 (D. Md. 2004) (finding lack of personal jurisdiction where plaintiffs merely included a foreign defendant in their "broad group pleadings" of fraud without alleging "a single specific act" by the defendant directed at the forum); *Grow Group, Inc. v. Jandernoa*, No. 94 Civ. 5679 (RPP), 1996 WL 31848, at \*5 (S.D.N.Y. Jan. 26, 1996) (holding that considering foreign defendants as a group for personal jurisdiction purposes would be unconstitutional).

**2. No Statute Provides a Basis for Personal Jurisdiction over the German DT Defendants.**

"To exercise personal jurisdiction over a non-resident defendant in a federal question case, the district court ha[s] to determine that a rule or statute potentially confers jurisdiction over the defendant and then conclude that asserting jurisdiction does not offend the principles

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parallel proceedings abroad, the Court should apply the factors articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which are similar to the *forum non conveniens* factors, and dismiss this suit based on abstention principles. *See Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1194-95 (9th Cir. 1991); *Mujica*, 381 F. Supp. 2d at 1159.

of Fifth Amendment due process.” *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1413 (9th Cir. 1989). Although Congress provided a statutory source of personal jurisdiction in RICO through nationwide service of process, *see Butcher’s Union Local No. 498 v. SDS Invs., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986), that provision does not apply to service on foreign defendants, *see Cent. States, S.E. & S.W. Areas Pension Fund*, 230 F.3d 934, 940-41 (7th Cir. 2000); *Flag Co. v. Maynard*, 376 F. Supp. 2d 849, 852 (N.D. Ill. 2005); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1183-84 (C.D. Cal. 1998), *aff’d*, 248 F. 3d 915 (9th Cir. 2001). Therefore, Vivendi cannot rely on RICO as the basis for jurisdiction and must instead attempt to base jurisdiction on Federal Rule of Civil Procedure 4(k)(1)(A) or 4(k)(2). Neither Rule provides a basis for jurisdiction here.

**a. Vivendi Cannot Establish Jurisdiction under Rule 4(k)(1)(A).**

For the Court to exercise personal jurisdiction over the German DT Defendants under Rule 4(k)(1)(A), the German DT Defendants must be subject to suit in the State of Washington. *See Fed. R. Civ. P. 4(k)(1)(A)*. This means that Washington’s long-arm statute must permit jurisdiction, and the exercise of such jurisdiction must not offend the Due Process Clause. *See Am Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 (9th Cir. 1996). Because Washington permits the exercise of jurisdiction to the full extent of the Due Process Clause, the statutory and constitutional analyses merge. *Easter v. Am. W. Fin.*, 381 F.3d 948, 960 (9th Cir. 2004). Due process requires that the German DT Defendants have purposefully availed themselves of Washington’s protections through minimum contacts with the State and that the exercise of jurisdiction in Washington would be reasonable. *Doe v. Unocal Corp.*, 248 F. 3d 915, 923-925 (9th Cir. 2001). Vivendi must establish that each of the German DT Defendants is subject to either specific or general jurisdiction in Washington.

Specific jurisdiction requires a showing that Vivendi’s claims arise out of each of the German DT Defendants’ conduct in Washington. *See id.* In assessing specific jurisdiction, the Ninth Circuit considers “the extent of the defendant’s contacts with the forum and the

1 degree to which the plaintiff's suit is related to those contacts. A strong showing on one axis  
 2 will permit a lesser showing on the other." *Yahoo! Inc. v. La Ligue Contre le Racisme et*  
 3 *L'antisemitisme*, 433 F.3d 1199, 1210 (9th Cir. 2006) (en banc & per curiam). The only  
 4 purported racketeering activity to have taken place even in part in Washington is an alleged  
 5 text message sent from Seattle by Thomas Winkler, a former T-Mobile International  
 6 executive, "regarding settlement negotiations." (SAC ¶ 51.) That single act, unattributed to  
 7 any particular DT Defendant, cannot give rise to specific jurisdiction over any German DT  
 8 Defendant, none of which is registered to do business in Washington, owns or leases property  
 9 in Washington, or markets, advertises, or sells their telecommunications products or services  
 10 here. (See Kuehbacher Decl. ¶¶ 11-14.)

11 Vivendi also has not alleged a sufficient basis for general jurisdiction over the German  
 12 DT Defendants. For the Court to exercise general jurisdiction, each of the German DT  
 13 Defendants' contacts with Washington must be "continuous and systematic." See *Tuazon*,  
 14 433 F.3d at 1171. Vivendi apparently attempts to predicate general jurisdiction over DT and  
 15 T-Mobile International by attributing to those entities T-Mobile USA's Washington contacts.<sup>9</sup>  
 16 (SAC ¶ 23.) Vivendi rests this claim on the fact that T-Mobile USA's CEO sits on T-Mobile  
 17 International's board, T-Mobile USA's website refers to the companies as "One Company,"  
 18 and senior T-Mobile International officials sat on the PTC board and ("upon information and  
 19 belief") conducted business at T-Mobile USA's Seattle headquarters. (*Id.*) These allegations,  
 20 even if taken as true, are hallmarks of a normal parent-subsidary relationship and do not  
 21 support jurisdiction on an agency or instrumentality theory. See *Doe* 248 F.3d at 927-28  
 22 (holding that a parent's formulation of policies and strategies of its subsidiaries, overlapping  
 23 directors and officers, and blurring of corporate separateness in annual reports do not support  
 24 piercing the corporate veil for jurisdictional purposes); see also *United States v. Bestfoods*,  
 25 524 U.S. 1, 51, 69 (1998) ("[I]t is entirely appropriate for directors of a parent corporation to

26 <sup>9</sup> The Complaint makes no allegations concerning T-Mobile USA's connections with TMD; accordingly,  
 27 Vivendi cannot impute T-Mobile USA's contacts to TMD.

1 serve as directors of its subsidiary, that fact alone may not serve to expose the parent  
 2 corporation to liability for its subsidiary's acts . . . . [D]irectors and officers holding positions  
 3 with a parent and its subsidiary can and do 'change hats' to represent the two corporations  
 4 separately, despite their common ownership . . . .'). Moreover, T-Mobile USA is a separate  
 5 corporate entity that does not sell the German DT Defendants' products or services in the  
 6 United States, and conducts its own day-to-day affairs. (Kirkpatrick Decl. ¶ 9.)

7 Even if Vivendi could establish that the German DT Defendants, on their own or by  
 8 virtue of their relationship with T-Mobile USA, have minimum contacts with Washington, the  
 9 exercise of jurisdiction would be unreasonable. To determine reasonableness, courts look to:  
 10 (1) the burden on the defendant, (2) the forum's interest in the dispute, (3) the importance of  
 11 the chosen forum to the plaintiff's interest in obtaining relief, (4) the most efficient forum for  
 12 judicial resolution of the dispute, and (5) the "shared interest of the several States in  
 13 furthering fundamental social policies." *Tuazon*, 433 F.3d at 1175. These factors  
 14 overwhelmingly weigh against the exercise of jurisdiction.

15 First, the German DT Defendants are based 5,000 miles from Seattle and would face  
 16 the "unique burdens placed upon one who must defend oneself in a foreign legal system."  
 17 *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 114 (1984). Second and third,  
 18 Washington has little interest in deciding a dispute among European corporations over control  
 19 of a Polish company, and the Washington forum has no special importance to Vivendi's  
 20 interest in obtaining relief. Fourth, Washington is a more remote and much less efficient  
 21 forum for this suit than the many European jurisdictions in which the claims have been and  
 22 could have been brought. Fifth, this suit has no bearing on any U.S. social policies.

23 **b. Vivendi Also Has Not Alleged Facts Sufficient to Establish**  
 24 **Jurisdiction under Rule 4(k)(2).**

25 To establish personal jurisdiction under Rule 4(k)(2), Vivendi would have to  
 26 demonstrate that: (1) its claim arises under federal law, (2) the German DT Defendants are not  
 27 subject to personal jurisdiction in any state, and (3) the exercise of personal jurisdiction in

Washington would comport with due process. *Pebble Beach Co.*, 453 F.3d at 1159. Vivendi has the burden to show that the German DT Defendants are *not* subject to personal jurisdiction in any state. *Saturn Biomed. Sys., Inc. v. Aircraft Med. Ltd.*, No. C06-020RSL, 2006 WL 1705895, at \*3 (W.D. Wash. June 14, 2006). Because it argues that T-Mobile USA's contacts with Washington can be imputed to DT and T-Mobile International AG, Vivendi has negated its ability to assert jurisdiction under Rule 4(k)(2). *See Doe*, 248 F.3d at 922-23 (noting that plaintiffs could not rely on Rule 4(k)(2) because they argued that the foreign parent corporation was subject to personal jurisdiction through the contacts of its U.S. subsidiaries).

Even if it could show that all states lack jurisdiction over the German DT Defendants, Vivendi still could not establish that the German DT Defendants could constitutionally be subject to the specific or general jurisdiction of the United States for the same reasons they are not subject to personal jurisdiction in the State of Washington.

### **C. The Court Lacks Subject Matter Jurisdiction over Vivendi's Claims.**

Where, as here, a plaintiff's RICO claims rely on transactions that take place partly or entirely outside the United States, the Court must assess whether it has subject matter jurisdiction over such claims by asking "whether our law was meant to reach the conduct in question insofar as it is extraterritorial in nature." *Republic of Philippines v. Marcos*, 818 F.2d 1473, 1478 (9th Cir. 1987). To make this determination, the Ninth Circuit has looked to the alleged "conduct" within the United States, and the alleged "effects" of the alleged RICO violation on U.S. commerce. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004). The allegations in the Complaint fail as a matter of law to satisfy either test.

#### **1. The Alleged Conduct within the United States Does Not Support Subject Matter Jurisdiction.**

Vivendi does not allege conduct in the United States that was "significant" to the alleged violations or that "furthered the fraudulent scheme." *Grunenthal v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983). Vivendi's claim that Thomas Winkler "integrated" PTC and T-



1 Mobile USA (SAC ¶¶ 3, 51) is insufficient. The Complaint avers in conclusory fashion that  
 2 Winkler performed this “integration” and, “upon information and belief,” was in the United  
 3 States on one occasion to discuss the alleged integration. (*Id.*) These allegations do not give  
 4 the Court any reason to believe that Winkler engaged in conduct in the United States that  
 5 furthered any fraud. Indeed, based on Vivendi’s allegations, the integration in which Winkler  
 6 allegedly participated could well have occurred after the alleged fraud was complete.

7 Similarly, the supposed uses of the U.S. wires in connection with an alleged fraud  
 8 during the 2004 settlement negotiations also does not support subject matter jurisdiction. (*Id.*  
 9 ¶ 3.) The **only** act for which Vivendi is seeking redress is the alleged “theft” of its interest in  
 10 PTC—an act that Vivendi concedes occurred outside of the United States. (*Id.* ¶¶ 2, 6, 14,  
 11 16, 36, 97.) The various alleged uses of the U.S. wires Vivendi identifies were, at best,  
 12 peripheral or preparatory to the alleged foreign fraud—which does not confer subject matter  
 13 jurisdiction. *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996) (“There is no  
 14 reason to extend the jurisdictional scope of RICO to make criminal the use of the mail and  
 15 wire[s] in the United States as part of an alleged fraud outside the United States. *We do not*  
 16 *suppose that Congress in enacting RICO had the purpose of punishing frauds by aliens*  
 17 *abroad even if peripheral preparations were undertaken by them here.*” (emphasis added)).

## 18 **2. The Alleged Effects on the United States Do Not Support Subject** 19 **Matter Jurisdiction.**

20 The Complaint also fails to allege the requisite “substantial effects” on the United  
 21 States to confer subject matter jurisdiction. *See In re Simon*, 153 F.3d 991, 997 (9th Cir.  
 22 1998); *Butte Mining PLC v. Smith*, 876 F. Supp. 1153, 1162 (D. Mont. 1995), *aff’d*, 76 F.3d  
 23 287 (9th Cir. 1996). “Transactions with only remote and indirect effects in the United States  
 24 do not qualify as substantial.” *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir.  
 25 1996). Instead, the alleged U.S. effects must be direct and foreseeable results of the unlawful  
 26 conduct. *See Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989).

The alleged loss of “honest services” and the “corruption tax” on U.S. consumers (SAC ¶ 26) are indirect and remote from Vivendi’s core claim that it was wrongfully deprived of the disputed PTC shares.<sup>10</sup> Nor do the alleged “effects” on Elektrim bondholders and DT ADR-holders support jurisdiction. The effects of any purported misrepresentations to Elektrim bondholders were in Poland, where the bondholders’ bankruptcy petition was pending. (*Id.* ¶¶ 1, 76, 90, 114-16.) To the extent that the alleged misconduct caused any “effects” on Elektrim bondholders or DT ADR-holders in the United States, those effects are exceptionally remote from the alleged “theft.” And T-Mobile USA’s purchase of the FCC spectrum is even more remote and speculative: Vivendi suggests that statements regarding the settlement and status of European legal proceedings led to alleged misstatements on the DT Defendants’ “consolidated balance sheet,” which in turn somehow increased T-Mobile USA’s ability to win a bid for a spectrum at an FCC auction. (*Id.* ¶¶ 98, 143.) (*But see* Kirkpatrick Decl. ¶ 18 (no financial reports submitted in connection with spectrum auction).)

**D. The Complaint Fails to State a Claim upon which Relief Can Be Granted under RICO.**

Finally, the Complaint should be dismissed for failure to state a claim. According to Vivendi, the DT Defendants allegedly committed wire fraud because: (a) they misled Vivendi into believing that the dispute was certain to settle thereby inducing Vivendi not to take action in the pending legal proceedings, and (b) they issued press releases describing the results of foreign legal proceedings. In propounding this theory, Vivendi fails to attribute a single alleged act of racketeering to any specific defendant.

**1. Vivendi Lacks Standing to Bring a RICO Claim.**

Under RICO, a “plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.”

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<sup>10</sup> The allegation of a “corruption tax” through higher roaming rates is both facially and factually insufficient to sustain jurisdiction. T-Mobile USA customers are paying the same roaming rate on calls made from Poland as they were in 2001. (Kirkpatrick Decl. ¶ 19.) The claim that T-Mobile USA customers face an increase in roaming rates is “made solely for the purpose of obtaining federal jurisdiction” and is “wholly insubstantial and frivolous.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004).



1 *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Vivendi lacks RICO standing  
 2 because its claim that it has been injured through loss of the PTC shares is not ripe, and it has  
 3 failed to plead that its alleged injury was caused “by reason of” the alleged pattern of  
 4 racketeering.

5 **a. Vivendi’s Claims of RICO Injury Are Not Ripe.**

6 According to the Complaint, Vivendi, through Telco, either continues to own the  
 7 disputed PTC shares or may recover “the money or the shares” in European proceedings.  
 8 Vivendi alleges that the Polish Supreme Court’s decision has left ownership of the PTC  
 9 shares to Telco, pending reconsideration in the lower courts. (*See* SAC ¶ 119.) Vivendi has  
 10 also brought the French Action and Swiss arbitration in which it seeks relief that is  
 11 substantially similar to the relief it seeks here, and has pending claims against the Republic of  
 12 Poland and before a London arbitral tribunal that could reduce or eliminate the loss it alleges  
 13 here. (*See id.* ¶¶ 70, 90-96.)

14 Because Vivendi alleges that it has already obtained, or has the ability to obtain, what  
 15 it seeks in proceedings abroad, its claims are not ripe, and it lacks standing under RICO. *See*  
 16 *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135-37 (2d Cir. 2003) (holding that RICO  
 17 injury was not ripe when plaintiffs’ RICO damages might be abated through favorable rulings  
 18 in pending arbitration). As in *Motorola*, until the foreign proceedings are over, Vivendi’s  
 19 claim is only for losses that may occur, not that have actually occurred. *See id.*; *Lincoln*  
 20 *House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990) (rejecting RICO claim that was  
 21 “contingent on events that may not occur as anticipated or may not occur at all,” namely the  
 22 plaintiff’s “success in a separate case in another court”); *Bankers Trust Co. v. Rhoades*, 859  
 23 F.2d 1096, 1106 (2d Cir. 1988) (holding that RICO claim should be dismissed when plaintiff  
 24 could recover some or all of the damages it sought in a pending bankruptcy proceeding).  
 25  
 26  
 27

**b. Vivendi Has Failed Adequately to Allege That the Purported RICO Violations Proximately Caused Damages.**

To have RICO standing, Vivendi must show that it was injured in its business or property “by reason of” the alleged RICO violations. *See* 18 U.S.C. § 1964(c). This standard requires proximate causation, or a “*direct* relation between the injury asserted and the injurious conduct alleged.” *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (emphasis added); *see also Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006) (finding lack of continuity because the alleged loss “could have resulted from factors other than [the] alleged acts of fraud”); *First Nationwide Bank*, 27 F.3d at 769-70 (holding that RICO proximate causation requires a plaintiff to show that the alleged fraud was “the reason the transaction turned out to be a losing one” and that the loss was foreseeable, not due to intervening causes, and factually direct).

If, despite Vivendi’s claims to the contrary, Telco no longer owns the PTC shares in question, that loss resulted from repeated rulings of European tribunals that the transfer of Elektrim’s shares was ineffective under Polish law. If that transfer was invalid, as the tribunals have ruled, Vivendi had no property right to the shares in the first place that could have been proximately harmed by the alleged racketeering. In these circumstances, Vivendi can only speculate that, absent the supposed racketeering: it would have decisively intervened in the Second and Third Vienna Arbitrations; the tribunals would have ruled in favor of Elektrim/Telco and upheld the transfer of shares; Telco would have retained ownership of the shares in the face of other legal proceedings; and Vivendi, as a shareholder of Telco, would have profited from its interest in PTC. Thus, Vivendi has failed to allege that it suffered any injury by reason of the alleged RICO violations. *See DeMauro v. DeMauro*, 115 F.3d 94, 97-98 (1st Cir. 1997) (holding that alleged loss of specific property, entitlement to which depended on the result of pending state-court litigation, was too speculative to satisfy RICO standing); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (holding that plaintiff who cannot establish a clear and definite right to the “lost” property

under applicable law lacks standing under RICO); *Nix v. Hoke*, 62 F. Supp. 2d 110, 116 (D.D.C. 1999) (holding that judgment sought in litigation is not “property” for RICO purposes); *Capasso v. CIGNA Ins. Co.*, 765 F. Supp. 839, 842 (S.D.N.Y. 1991) (holding that mere expectation of a favorable decision in a separate suit was insufficient to establish RICO standing).

## 2. The Complaint Fails to Allege a Pattern of Racketeering.

Both counts of the Complaint require Vivendi to plead a pattern of racketeering activity. *See* 18 U.S.C. § 1962(b), (c). Indeed, “the heart of any RICO complaint is the allegation of a pattern of racketeering.” *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987). The Complaint fails to allege any pattern of racketeering.

### a. The 2004 Settlement Communications Do Not Form a Pattern of Racketeering.

#### (1) The Alleged 2004 Settlement Communications Were Not Racketeering Acts.

To state a RICO claim, Vivendi must allege that the DT Defendants engaged in two or more acts that could subject each of them to indictment for wire fraud. *See* 18 U.S.C. § 1961(1)(B). Vivendi’s core racketeering allegations relate to settlement negotiations between the DT Defendants and Vivendi over a four-month period in 2004. (SAC ¶ 51.) Vivendi claims that the DT Defendants engaged in wire fraud during the settlement negotiations by failing to disclose their purported collusion with Elektrim, which would have caused Vivendi to take steps to attempt to change the outcome of the Second Vienna Arbitration. (*Id.* ¶ 55.) Those steps consist of enforcing its purported right to control Elektrim’s defense, calling the alleged collusion between the DT Defendants and Elektrim to the tribunal’s attention, filing various actions in Poland, and purchasing more stock in Elektrim. (*Id.*)

This theory lacks merit on its face and is not pled with the required particularity. Vivendi has not alleged that Elektrim’s defense in the Second Vienna Arbitration was in any

1 way deficient or that Elektrim influenced the tribunal during the Second Vienna Arbitration in  
 2 TMD's favor. Vivendi has not, therefore, alleged any "scheme to defraud" that was furthered  
 3 by the alleged omissions or misrepresentations in the purported settlement communications.

4 Moreover, it is well-established that "one who fails to disclose material information  
 5 prior to the consummation of a transaction commits fraud only when he is under a duty to  
 6 [disclose] . . . because of a fiduciary or other similar relation of trust and confidence between  
 7 [the parties]." *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (internal quotation marks  
 8 omitted); *see also Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir.  
 9 1996) ("The parties to an impersonal market transaction owe no duty of disclosure to one  
 10 another absent a fiduciary or agency relationship, prior dealings, or circumstances such that  
 11 one party has placed trust and confidence in the other." (internal quotation marks omitted)).  
 12 In the context of arms-length business negotiations, there is no such duty. *See Goel v. Jain*,  
 13 259 F. Supp. 2d 1128, 1137 (W.D. Wash. 2003) (rejecting claim that defendants committed  
 14 fraud during negotiations of an employment agreement by failing to disclose facts bearing on  
 15 the plaintiff's future employment). And there is certainly no such duty when those  
 16 negotiations are between adversaries in legal proceedings. *See DeLorean v. Cork Gully*, 118  
 17 B.R. 932, 943 (E.D. Mich. 1990) (rejecting wire-fraud claim based on omissions because "[i]t  
 18 is wholly unbelievable that plaintiffs would rely on statements by their adversaries or [their  
 19 adversaries'] counsel"). Criminalizing alleged failures to engage in good faith settlement  
 20 negotiations would dangerously expand the scope of the mail and wire-fraud statutes.

## 21 (2) The Alleged 2004 Settlement Communications Were 22 Insufficiently Continuous.

23 To meet RICO's "pattern" requirement, Vivendi must allege that the DT Defendants  
 24 committed at least two predicate acts that qualify as "racketeering," which are related and  
 25 amount to or pose a threat of *continued criminal activity*. *See H.J. Inc. v. Nw. Bell Tel. Co.*,  
 26 492 U.S. 229, 239 (1989) (emphasis added). The "continuity" requirement may be met only  
 27

1 by alleging either “past conduct that by its nature projects into the future with a threat of  
2 repetition” (“open-ended continuity”) or “a series of related predicates extending over a  
3 substantial period of time” (“closed-ended continuity”). *Id.* at 241-42. The Complaint does  
4 not allege either.

5 The purportedly misleading omissions during the settlement negotiations do not meet  
6 the requirement for open-ended continuity because nothing about this alleged conduct projects  
7 into the future with a threat of repetition. “[A] single episode with a single purpose which  
8 happen[s] to involve more than one act taken to achieve that purpose” cannot be a pattern of  
9 racketeering. *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992); *see also*  
10 *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992) (per curiam) (holding  
11 that predicate acts with the singular goal of winning a lawsuit do not pose a continued threat  
12 of racketeering activity once the suit is over and therefore do not constitute a pattern); *Jarvis*  
13 *v. Regan*, 833 F.2d 149, 153 (9th Cir. 1987) (holding that pattern requirement not satisfied by  
14 allegations that legal aid organizations committed predicate acts of mail and wire fraud to  
15 obtain one federal grant); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393,  
16 1399 (9th Cir. 1986) (holding that pattern requirement not established by allegations that  
17 defendant fraudulently obtained single shipment of goods); *Lipin Enters. Inc. v. Lee*, 803 F.2d  
18 322, 324 (7th Cir. 1986) (holding that fraud aimed at sale of company failed to satisfy  
19 continuity requirement).

20 This series of purported racketeering acts over a mere four-month period also fails to  
21 establish closed-ended continuity. RICO applies only to long-term criminal activity  
22 extending well beyond a few months. *See H.J. Inc.*, 492 U.S. at 242 (“Predicate acts  
23 extending over a few weeks or months and threatening no future criminal conduct do not  
24 satisfy [the closed-ended continuity] requirement: Congress was concerned in RICO with  
25 long-term criminal conduct.”); *Howard v. Am. Online Inc.*, 208 F.3d 741, 750 (9th Cir. 2000)  
26 (“Activity that lasts only a few months is not sufficiently continuous”); *Religious Tech. Ctr.*,

971 F.2d at 367 (“A pattern of activity lasting only a few months does not reflect the ‘long term criminal conduct’ to which RICO was intended to apply.”).

**b. The Post-2004 Allegations Do Not Remedy the Lack of a Pattern of Racketeering.**

Vivendi also has alleged a handful of isolated, unrelated communications by the DT Defendants two years later. These later alleged racketeering acts consist of (a) three press releases that the DT Defendants allegedly issued in September and October 2006 and January 2007, which supposedly misled Elektrim’s bondholders and DT’s ADR-holders as to the legal effect of decisions in the Third Vienna Arbitration (SAC ¶¶ 101, 104-05, 111-12, 122),<sup>11</sup> and (b) an unrelated March 7, 2006 phone call to Vivendi’s CEO, in which “T-Mobile” representatives allegedly indicated that PTC would not provide a mobile network agreement to one of Solorz’s companies (*id.* ¶ 81).

**(1) The Post-2004 Acts Were Not Wire Fraud.**

**(a) The March 7, 2006 Phone Call Was Not Wire Fraud.**

Vivendi alleges that in a phone call with Vivendi’s CEO on March 7, 2006, employees of the DT Defendants made “misleading statements about T-Mobile’s relationship with Solorz and Elektrim,” because they indicated “T-Mobile had not agreed that PTC would provide Solorz (through PTC) with an agreement known as a Mobile Virtual Network Operator Agreement (‘MVNO’) . . . that would allow one of Solorz’s companies to compete with PTC.” (SAC ¶ 81.) But to constitute wire fraud, the scheme to defraud must involve falsehoods concerning material matters—those to which a reasonable person would attach importance in making a decision. *See Neder v. United States*, 527 U.S. 1, 22 & n.5, 25 (1999). Vivendi could not have attached any importance to the alleged MVNO

<sup>11</sup> For the same reasons that the alleged settlement negotiation communications lack continuity, the three press releases issued between September 2006 and January 2007 cannot themselves constitute a pattern of racketeering. *See, e.g., Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992).

1 representation, which was made in 2006, when, according to the Complaint, Vivendi  
 2 supposedly knew in **December 2004** that “it had been the victim of collusion between T-  
 3 Mobile and Solorz.” (SAC ¶ 60.). Vivendi does not even allege the relevance of the MVNO  
 4 communication to the parties’ purported settlement discussions.

5 Moreover, Vivendi fails to allege how the statement about the MVNO could have  
 6 furthered the purported scheme to deprive Vivendi of an opportunity to change the decision of  
 7 the tribunal in the Third Vienna arbitration, move to suspend a decision of the Polish Court of  
 8 Appeal, or “join forces with Elektrim bondholders.” (*Id.* ¶ 86.)

9 **(b) The Alleged Press Releases Cannot Constitute**  
 10 **Wire Fraud Because, As Alleged, They Did**  
 11 **Not Contain Material Misrepresentations.**

12 Vivendi does not allege that the press releases were false or misleading, and therefore  
 13 does not allege wire fraud. *See United States v. Goodman*, 984 F.2d 235, 237-38 (8th Cir.  
 14 1993) (finding no scheme to defraud under the mail-fraud statute when the statements in the  
 15 communications were literally true). The September 5, 2006 press release allegedly stated  
 16 that the DT Defendants had legally acquired the PTC shares based on a Call Option awarded  
 17 by the tribunal in the Third Vienna Arbitration. (SAC ¶ 99.) Based on Vivendi’s own  
 18 allegations, there was nothing false or misleading about that statement. (*See id.* ¶ 87.)

19 The second press release, issued on October 4, 2006, likewise does not contain any  
 20 material falsehood. Vivendi alleges that the Second Partial Award in the Third Vienna  
 21 Arbitration “recognized that T-Mobile had properly exercised the Call Option and that the  
 22 price [of the PTC shares paid to Elektrim] would be based on PTC’s net asset value.” (*Id.*  
 23 ¶ 110.) Thus, Vivendi concedes that the tribunal upheld the claim that TMD was entitled to  
 24 the PTC shares. The October 4, 2006 press release merely reports this decision, stating that  
 25 “the Arbitral Tribunal in Vienna conferred the ownership title” to the PTC shares. (*Id.* ¶ 111.)  
 26 Based on Vivendi’s own allegations, there was no false or misleading statement.  
 27



1 Finally, the January 28, 2007 press release, which allegedly announced the  
 2 incorporation of PTC's assets into the DT Defendants' consolidated earnings, also was not, on  
 3 the face of Vivendi's pleading, false or misleading. According to the Complaint, the tribunal  
 4 in the Third Vienna Arbitration had ruled that the PTC shares were to be transferred to TMD.  
 5 (*Id.* ¶ 87). That being the case, a press release announcing the consolidation of earnings could  
 6 not mislead anyone.

7 If the press releases were false or misleading in any way, they were not materially so.  
 8 To allege wire fraud, Vivendi must plead facts showing that the alleged misrepresentations  
 9 had "a natural tendency to influence, or [were] capable of influencing, the addressee's  
 10 decision." *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004). The "addressees"  
 11 of the press releases allegedly were Elektrim's bondholders; Vivendi; U.S. investors,  
 12 including DT's ADR-holders; and "the public." (*See* SAC ¶¶ 100-01, 104-05, 112-13, 122.)  
 13 Given the acknowledged context of the press releases, it makes no sense to claim that the  
 14 releases had a "natural tendency" to convince Elektrim's bondholders to give up a bankruptcy  
 15 petition in Poland, Vivendi to cave-in and accept a low-ball settlement, or U.S. investors to  
 16 trade DT ADRs simply because they did not include a caveat as to the timing of the share  
 17 transfer. Further, as this suit demonstrates, none of the multiple arbitral and judicial decisions  
 18 in favor of the DT Defendants influenced Vivendi to drop the claims it has now made in six  
 19 European countries, over nearly eight years. It is preposterous for Vivendi to argue now that  
 20 the DT Defendants' press releases were capable of producing that result.

21 **(c) The Press Releases Cannot Support a RICO**  
 22 **Claim Because They Involve Alleged Conduct**  
**Actionable as Securities Fraud.**

23 Even if any of the press releases were materially false or misleading, Vivendi's claim  
 24 pertaining to them would fall within RICO's securities-fraud exception. RICO provides that  
 25 "no person may rely upon any conduct that would have been actionable as fraud in the  
 26 purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c).



1 “The rule that a plaintiff cannot assert a RICO claim based on predicate acts that sound in  
 2 securities fraud is applicable even if, as is the case here, the claim is pled as a matter of mail  
 3 fraud or wire fraud.” *Swartz v. KPMG, LLC*, 401 F. Supp. 2d 1146, 1151 (W.D. Wash. 2004),  
 4 *aff’d & adopted*, 476 F.3d 756, 761 (9th Cir. 2007); *see also Bald Eagle Area Sch. Dist. v.*  
 5 *Keystone Fin., Inc.*, 189 F.3d 321, 327 (3d Cir. 1999) (holding that RICO exception was  
 6 meant to prevent plaintiffs from “plead[ing] other specified offenses, such as mail or wire  
 7 fraud, as predicate acts under civil RICO if such offenses are based on conduct that would  
 8 have been actionable as securities fraud” (quoting H.R. Conf. Rep. No. 104-369, at 47  
 9 (1995))). The exception applies as long as **anyone**, not necessarily the RICO plaintiff, would  
 10 have had standing to bring a claim for securities fraud. *See Howard*, 208 F.3d at 749.

11 Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful for any  
 12 person “[t]o use or employ, in connection with the purchase or sale of any security,” a device,  
 13 scheme, or artifice to defraud. 15 U.S.C. § 78j(b). Rule 10b-5, which implements section  
 14 10(b), similarly forbids the use, “in connection with the purchase or sale of any security,” of  
 15 “any act, practice, or course of business” that operates as a fraud or deceit. 17 C.F.R.  
 16 § 240.10b-5. A device, scheme, or artifice to defraud is made “in connection with” the  
 17 purchase or sale of a security if “the scheme to defraud and the sale of securities coincide.”  
 18 *SEC v. Zandford*, 535 U.S. 813, 822 (2002).

19 Vivendi alleges that the DT Defendants fraudulently included PTC as an asset on their  
 20 balance sheet (*see* SAC ¶¶ 98, 143) and issued press releases that both misled their U.S.  
 21 ADR-holders and caused an increase in the value of the ADRs (*see* SAC ¶¶ 99-104, 111-12,  
 22 122).<sup>12</sup> The Complaint also alleges that “U.S. investors who made investments in T-Mobile’s  
 23 ADRs . . . would not have made the same investment decisions if they had known that  
 24 T-Mobile was engaged in racketeering.” (*Id.* ¶ 105.) Taking Vivendi’s allegations as true for  
 25

26 <sup>12</sup> Vivendi has expressly suggested that it believes that the DT Defendants’ statements about European arbitral  
 27 and court decisions “rais[e] serious concerns under U.S. securities laws.” (*See* SAC ¶ 120.)

purposes of this motion,<sup>13</sup> the allegedly misleading press releases on which Vivendi relies fall within the securities-fraud exception and cannot constitute part of a pattern of racketeering.

**(2) The Alleged Post-2004 Racketeering Acts Cannot Be Appended to the Alleged 2004 Acts to Form a Pattern Because They Are Unrelated.**

The only connection between the settlement communications and the isolated communications by the DT Defendants two years later is that they involve the DT Defendants and concern PTC. They lack the requisite “relatedness” to constitute a pattern. *See H.J. Inc.*, 492 U.S. at 238-39.

The press releases lack “relatedness” to the alleged settlement communications because the two groups of acts bear no relationship “to each other or to some external organizing principle that renders them ‘ordered’ or ‘arranged,’” and thus a “pattern.” *Id.* at 238. Aside from the telling two-year hiatus, they lack relatedness because they were purportedly aimed at entirely different purposes and “victims”—the alleged settlement communications were purportedly calculated to induce Vivendi’s forbearance regarding the Second Vienna Arbitration, and the press releases were allegedly aimed at misleading Elektrim’s bondholders and DT’s ADR-holders, in order to manipulate Elektrim’s bankruptcy proceedings and DT’s share price. *See Sedima*, 473 U.S. at 496 n.14; *Howard*, 208 F.3d at 749. In addition, the March 7, 2006, phone call had nothing to do with the alleged settlement communications or press releases, and did not even concern the disputed PTC shares. *See Howard*, 208 F.3d at 749 (“To hold that Plaintiffs have established relatedness solely because they implicate the same participants makes that requirement virtually meaningless.”).

**c. The Complaint Fails to Plead Each DT Defendant’s Fraudulent Acts with Particularity.**

Federal Rule of Civil Procedure 9(b) mandates that “circumstances constituting fraud . . . shall be stated with particularity.” Rule 9(b) “requires a pleader of fraud to detail with

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<sup>13</sup> Needless to say, the DT Defendants deny that any of the press releases was misleading in any way.

1 particularity the time, place, and manner of each act of fraud, plus the role of each defendant  
 2 in each scheme.” *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405  
 3 (9th Cir. 1991). This requirement applies to RICO complaints based on alleged wire fraud.  
 4 *See Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

5 The Complaint, however, never specifies which DT Defendant allegedly committed  
 6 which act of wire fraud. “Rule 9(b) does not allow a complaint to merely lump multiple  
 7 defendants together but require[s] plaintiffs to differentiate their allegations when suing more  
 8 than one defendant . . . and inform each defendant separately of the allegations surrounding  
 9 his alleged participation in the fraud.” *Swartz*, 476 F.3d at 764-65 (internal quotation marks  
 10 omitted); *see also Moore*, 885 F.2d at 541 (finding RICO claims based on fraud fatally  
 11 deficient for failure to attribute specific conduct to individual defendants); *ITI Internet Servs.*,  
 12 *Inc. v. Solana Capital Partners, Inc.*, No C05-2010Z, 2006 WL 1789029, at \*8 (W.D. Wash.  
 13 June 27, 2006) (dismissing RICO claims for failure to allege “the role or conduct of any  
 14 particular Defendant”). For this reason, the Complaint should be dismissed.

### 15 **3. The Complaint Fails to State a Claim under § 1962(b).**

16 Vivendi also has failed to state a claim for a violation of § 1962(b) relating to the  
 17 purported “take over” of PTC. That section provides: “It shall be unlawful for any person  
 18 through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any  
 19 interest in or control of any enterprise.” 18 U.S.C. § 1962(b). To state a claim under  
 20 § 1962(b), Vivendi must allege that: (1) each of the DT Defendants’ racketeering activity led  
 21 to their control over PTC, and (2) a sufficient injury to Vivendi’s business or property resulted  
 22 from the acquisition of control over PTC. *See Wagh v. Metris Direct, Inc.*, 348 F.3d 1102,  
 23 1111 (9th Cir. 2003). This claim fails because the allegations do not provide the required  
 24 nexus between the alleged racketeering acts and control over PTC, which, if it occurred,  
 25 resulted only after intervening determinations in various legal proceedings. *See supra*  
 26 Part III.D.1.b. Furthermore, Vivendi has not alleged an injury from the DT Defendants’  
 27

1 acquisition of control over PTC that is separate from the purported harm stemming from the  
 2 wire fraud. *See Tuscano v. Tuscano*, 403 F. Supp. 2d 214, 228 (E.D.N.Y. 2005) (“The  
 3 ‘acquisition or maintenance injury’ must be separate and apart from the injury suffered as a  
 4 result of the predicate acts of racketeering.”); *Perez v. McDonald’s Corp.*, No. Civ-S-97-  
 5 0641, 1998 WL 59083, at \*5 (E.D. Cal. Jan. 29, 1998) (same). The alleged loss of the PTC  
 6 shares as a result of the purported racketeering cannot also be the claimed “acquisition  
 7 injury.”

#### 8 **4. The Complaint Fails to State a Claim under § 1962(c).**

9 Section 1962(c) makes it unlawful for “any person employed by or associated with  
 10 any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to  
 11 conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs  
 12 through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). Here, the Complaint claims  
 13 that the DT Defendants and Elektrim conducted the affairs of two enterprises—Elektrim and  
 14 the so-called “T-Mobile global wireless network”—through a pattern of racketeering activity.  
 15 But Vivendi does not adequately allege that the DT Defendants are distinct from the “T-  
 16 Mobile global wireless network” or that any DT Defendant conducted or participated in the  
 17 conduct of Elektrim’s affairs.

##### 18 **a. Vivendi Has Not Alleged That the DT Defendants Are 19 Distinct from the T-Mobile Network.**

20 Under § 1962(c), it is unlawful for “any person . . . associated with any enterprise . . .  
 21 to conduct . . . such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C.  
 22 § 1962(c). Vivendi’s § 1962(c) claim fails because it has not alleged that the “persons” who  
 23 allegedly violated § 1962(c) are distinct from the “enterprise” whose affairs the persons  
 24 allegedly conducted. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161  
 25 (2001); *see also Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (“[L]iability [under  
 26 §1962(c)] depends on a showing that the defendants conducted or participated in the conduct  
 27 of the ‘enterprise’s affairs,’ not just their own affairs.”).

Merely alleging that a RICO enterprise consists of a parent corporation and its subsidiaries, all of which are also alleged to be the RICO persons, does not satisfy this requirement. *See, e.g., Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996) (holding a group of corporations within a “unified corporate structure” could not be both a RICO enterprise and the defendants), *vacated on other grounds*, 525 U.S. 128 (1998); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (“[B]y alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctiveness requirement may not be circumvented.”); *R.R. Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991) (“[T]he [distinctiveness] rule would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf.”); *Lee v. Gen. Nutrition Cos.*, No. 00-13550LGB, 2001 WL 34032651, at \*14 (C.D. Cal. Nov. 26, 2001) (finding lack of person/enterprise distinction when enterprise consisted of corporate defendant, its affiliates, and two of its officers because “each of the persons pled operated within a unified corporate structure”). The Complaint does not identify any distinction between “T-Mobile,” the term used by Vivendi to lump all of the DT Defendants together, and the purported “T-Mobile global wireless network” enterprise.

**b. Plaintiff Has Not Alleged That the DT Defendants Conducted or Participated in the Conduct of Elektrim’s Affairs.**

“‘[T]o conduct or participate, directly or indirectly, in the conduct of [an] enterprise’s affairs,’ one must participate in the operation or management of the enterprise itself.” *Reves*, 507 U.S. at 185 (alteration added) (quoting 18 U.S.C. § 1962(c)). This standard requires a “degree of direction” or “control” over the enterprise beyond mere aiding and abetting the acts of others within the enterprise. *See id.* at 178-79; *United States v. Shryock*, 342 F.3d 948, 985 (9th Cir. 2003). The Complaint does not allege any level of control or management of

Elektrim by any of the DT Defendants. Indeed, Vivendi repeatedly claims that Solorz controls Elektrim. (*See, e.g.*, SAC ¶¶ 2, 18, 46-49, 67-69, 71-75, 109, 124.) That being the case, Vivendi has not properly alleged a RICO claim against the DT Defendants based on the supposed participation in Elektrim's operations.

**5. The Complaint Fails to State a Claim That the DT Defendants Violated § 1962(d).**

Where, as here, the allegations of a substantive violation of section 1962(b) or (c) are deficient, a section 1962(d) conspiracy claim cannot stand. *Wagh*, 348 F.3d at 1112; *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000); *Howard*, 208 F.3d at 751. Moreover, Vivendi cannot hold the DT Defendants liable for conspiracy to violate RICO through wire fraud without specifying how each of them participated in the conspiracy. Vivendi has not made any effort to satisfy that pleading obligation. *See Swartz*, 476 F.3d at 765; *Blake v. Dierdorff*, 856 F.2d 1365, 1371 (9th Cir. 1988).

**6. The Claim for Injunctive Relief Should Be Dismissed.**

Because "injunctive relief is not available to a private party in a civil RICO action," *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967 (9th Cir. 1999) (internal quotation marks omitted), Vivendi's demand for return of the shares should also be dismissed.

**IV. CONCLUSION**

For the foregoing reasons, Vivendi's Complaint should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 17th day of May, 2007.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2007, I filed this Motion to Dismiss the Second Amended Complaint on the CM/ECF system, which will send notification of such filing to the following persons:

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DATED this 17th day of May, 2007.

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